

WANG (Migration) [2021] AATA 2934 (11 June 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Liang Wang

CASE NUMBER: 1803107

HOME AFFAIRS REFERENCE(S): BCC2016/1196510

MEMBER: David Barker

DATE: 11 June 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) of Schedule 2 to the Regulations; and
- cl 820.221 of Schedule 2 to the Regulations.

Statement made on 11 June 2021 at 2:04pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

Re MILGEA and Dhillon [1990] FCA 144

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 18 March 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because they were not satisfied the evidence before them demonstrated that the applicant is a spouse or de facto partner of the sponsor, as defined under ss 5F and 5CB of the Act.
5. The applicant appeared before the Tribunal on 25 May 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and her father. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. BACKGROUND

9. The applicant is a national of China and is 46 years old. He first travelled to Australia on 8 March 2016 on a subclass 600 Visitor visa. The applicant lodged an application for a Partner visa on 18 March 2016. This application was refused by the Department on 22 January 2018.
10. The sponsor was born in China on 24 January 1983 and is 38 years old. She came to Australia in 29 December 1997 and was granted Australian citizenship on 26 June 2008. She was previously partnered in a de facto relationship to Liang Chao, from June 2006 to December 2009. There was one child from that relationship born in May 2007.
11. The visa application forms state the parties met in Tianjin, China through the applicant's relatives on 29 December 2015. The parties were married in Shanghai on 21 January 2016.
12. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following: written submissions, written statements from the applicant and the sponsor, communication records, utility bills, property purchase contract, banking and other financial records, documents pertaining to the parties' identities and marital status, photographs and witness support statements.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is the spouse, as defined in s 5F of the Act, of the sponsor.
14. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files and oral evidence provided by the applicant, sponsor and witness at the hearing. The Tribunal has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.
15. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the extensive documentary evidence provided with the review application. The Tribunal found the parties and the sponsor's father to be credible witnesses who gave their evidence in a calm, rational manner without embellishment. The Tribunal was satisfied that positive weight could be accorded to the evidence provided in support of the parties' relationship.

Whether the parties are in a spouse or de facto relationship

16. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
18. In *Re MILGEA and Dhillon* [1990] FCA 144, the Federal Court stated, "people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

Are the parties validly married?

19. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married. The Tribunal has reviewed a Certificate of Marriage which states the parties registered their marriage in Shanghai on 21 January 2016 and a Notarial Certificate, dated 4 July 2016, in support of the Marriage

Certificate. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

20. The financial aspects of the relationship

21. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
22. The sponsor gave evidence at hearing that he and the sponsor operate a number of bank accounts, with his finances mainly going through a joint account they operate with the Commonwealth Bank (CBA). He said that he and the sponsor were both of mature age when they married and that she has maintained her pre-relationship accounts, into which her employment earnings are deposited. He said they do not have rigid rules as to who pays for what, with the exception of regular payments made from the joint account. He said that with respect to other expenses, either of them pays them as the need arises.
23. The parties reside in a residential property they purchased in Burwood, NSW in March 2020. The property title and home loans are in the sponsor's name. They claim that these were less complex and less expensive arrangements. They emphasise however that the applicant pays at least half of the regular home loan payments, with his contribution coming from the joint CBA account. There is evidence in this account of the applicant's employment earnings being deposited into this account and that expenses paid from the account go to, as well as contributions to the home loan, towards groceries and other regular financial commitments such as insurance, fuel, health insurance, internet and other utility costs. The couple have joint liabilities in the form of funds borrowed from family members, which went towards the deposit for the Burwood property. They have yet to repay this loan but they regard it as a commitment which they will both honour.
24. After reviewing the available evidence, the Tribunal is satisfied that the financial aspects of the parties' relationship support a finding that they have a mutual commitment to a shared life together as spouses.

25. The nature of the household

26. The Tribunal has considered the nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
27. At the present time the sponsor's son continues to reside in his maternal grandparents' home, where the parties also lived until moving to the Burwood property in mid-2020. The sponsor's father gave evidence that his daughter and son-in-law initially bought the Burwood property as an investment, but that the coronavirus pandemic resulted in difficulty finding people to lease it, so the decision was made for the parties to move there. Notwithstanding this, the Tribunal is satisfied the oral evidence at hearing and photographic evidence demonstrates the shared responsibility that the applicant has assumed for the care and support of the applicant's child since the parties married in 2016.
28. The Tribunal is satisfied that the available evidence demonstrates that the parties have shared a household since the applicant's arrival in Australia in March 2016, initially as part of the household at the sponsor's family home in Waverton, NSW and more recently in the household they established together in the residential property purchased in Burwood.

29. The applicant reported that the parties have a focus on consolidating their financial security, as they have both come to the marriage at a mature age without significant pre-existing assets. He is working two jobs, which results in him leaving home at 7:00 am on workdays and not returning until 11:00 pm. The sponsor works at a café and has more flexible work hours. She usually leaves their home around 6:00 am and finishes work at 4:00 pm, at which time she goes to her parents' home and spends time with them and her son. With respect to household chores, the applicant gave evidence that the sponsor attends to most of them during the week, as his employment commitments take up much of his time. He said they share cooking and shopping and some household cleaning tasks over weekends.
30. The Tribunal considers there to be nothing particularly unusual or untoward about the parties' household arrangements, in the context where they are both in full-time employment and there is strong intrafamilial connections and support from grandparents with respect to childcare.
31. The Tribunal is satisfied the nature of the household aspects of the parties' relationship support the contention they are in a genuine and continuing spousal relationship.

32. The social aspects of the relationship

33. The Tribunal has considered the social aspects of the relationship – including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
34. The parties have given supporting evidence to their claims that they socialise together, as their work commitments permit and are invited as a couple to social events including family celebrations and picnics. Their evidence about their individual and joint relationships with their respective families was consistent and the Tribunal is satisfied that the parties represent themselves to family and others as a married couple. The evidence provided at hearing by the sponsor's father with respect to this issue was credible and compelling. The Tribunal is satisfied that he provided reliable evidence as to the applicant's commitment to both his daughter and grandson and his judgement that the applicant is a person of good character.
35. The Tribunal is satisfied that the social aspects of the parties' relationship supports a finding that they consider the relationship to be long term and they have a mutual commitment to a shared life together to the exclusion of all others.

36. The nature of the persons' commitment to each other

37. The Tribunal has considered the nature of the persons' commitment to each other – including the duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
38. The applicant gave evidence at hearing that he found himself at a stage of his adult life where he had not found a partner and that he realised he was at risk of this continuing to be the case. He said that his parents wished him to have the benefit of marriage and family life of his own and that through their and the sponsor's family mutual connections the parties were introduced to each other as two adults who could have a viable life together. He told the Tribunal that since they met each other and made a commitment to their marriage he has come to realise the benefit of the companionship within the marriage and from working together towards future agreed goals.

39. The parties gave compelling and consistent evidence about the nature of their commitment to each other. It was evident that over the course of the past five years they have shared their lives and have developed plans for their future together. With respect to this factor, the Tribunal is satisfied that the applicant provided support to the sponsor during her recovery from treatment for an oncology condition. The Tribunal is satisfied they share goals that are not dissimilar to many couples. With respect to this issue, the applicant gave evidence at hearing that he is reconciled to the parties not having a child from their relationship, but that his close connection with his stepson has given him the sense of family and the opportunity to parent that would otherwise not have come his way.

40. The Tribunal is satisfied that the evidence supports a finding that the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that they live together and that their relationship is genuine and continuing.

41. The Tribunal has placed considerable weight on this aspect of the parties' relationship and views it as a strong indicator that they are in a genuine and continuing spousal relationship. The Tribunal is satisfied the parties are in an exclusive relationship and that they have a mutual commitment to a shared life together. The Tribunal is satisfied they see their relationship as long term and have placed weight on the duration of the relationship, which has now existed for over five years.

42. *Conclusions on spouse criteria*

43. The Tribunal notes there is no evidence to suggest either of the parties are in a relationship with a third party. There is also no evidence to establish the parties do not live together at the present time at the same residential address. I consider the financial, household, commitment and social aspects of the parties' relationship are indicative of a couple in a spousal relationship. Consistent with Dhillon, I consider that the relevant test in this matter is whether at the time of application and the time of this decision, it can be said that the parties had and have a mutual commitment to a shared life as husband and wife to the exclusion of others. I am satisfied the evidence demonstrates such a commitment.

44. Having regard to all the circumstances of this relationship, the Tribunal is satisfied that the applicant and his sponsor married in January 2016 and they are in a genuine and continuing relationship, that they have a mutual commitment to a shared life to the exclusion of all others, and that they live together, or not separately and apart, on a permanent basis.

45. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.

46. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl 820.211(2)(a) and continues to meet that criteria at the time of this decision.

47. At the time of the application, the applicant was sponsored by the sponsoring partner who had turned 18 years of age. He continues to be sponsored by his sponsoring partner. Therefore, the applicant meets cl 820.211(2)(c) and continues to meet that criteria at the time of this decision.

48. At the time of the application, the applicant held a substantive visa and accordingly the provisions in cl 820.211(2)(d) are not relevant.

49. As the applicant meets the criteria in cl 820.211(2) and continues to meet the criteria at the time of this decision, the applicant meets the criteria in cl 820.221(1).

50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

51. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2) of Schedule 2 to the Regulations; and
 - cl 820.221(1) of Schedule 2 to the Regulations.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).